

**BEFORE THE  
RESPIRATORY CARE BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

LEEANN R. FORSYTHE  
26365 Fawn Ct.  
Pioneer, CA 95666

Case No.: S-373

OAH No.: N2007030578

**DECISION AND ORDER**

The attached proposed Decision of the Administrative Law Judge is hereby adopted by the Respiratory Care Board of California, Department of Consumer Affairs, as its Decision in the above entitled matter.

This Decision shall become effective on June 27, 2007.

It is so ORDERED June 20, 2007.



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LARRY L. RENNER, BS, RRT, RCP, RPFT  
PRESIDENT, RESPIRATORY CARE BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

BEFORE THE  
RESPIRATORY CARE BOARD  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Statement of Issues  
Against:

LEEANN RENEE FORSYTHE  
Pioneer, CA 95666

Respondent.

Case No. S-373

OAH No. N2007030578

**PROPOSED DECISION**

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 11, 2007, in Sacramento, California.

Catherine E. Santillan, Senior Legal Analyst, represented Stephanie Nunez (complainant), Executive Officer, Respiratory Care Board (Board).

Leeann Renee Forsythe (respondent) was present and was represented by Jeffrey S. Kravitz, Attorney at Law.

Evidence was received, the record was closed, and the matter was submitted on May 11, 2007.

**FACTUAL FINDINGS**

1. On October 20, 2006, the Board received an application from respondent for a respiratory care practitioner license. Respondent disclosed the arrest described in Factual Finding 2 on her application. The Board denied the application on December 21, 2006. Respondent requested a hearing on the denial.

2. On June 12, 2001, respondent was arrested for possessing a baggie containing .73 grams of methamphetamine. The baggie was in her pants pocket. Respondent asserted that the arrest occurred at a difficult time in her life. She was separated from her husband. She was unemployed. Her brother and boyfriend were living with her from time to time.

At hearing, respondent admitted that the baggie was found in her pants pocket, but denied any knowledge of how it got there. Her denial was not credible. Although respondent admitted that she had tried methamphetamine when she was a teenager, she denied that she was using methamphetamine at the time of her arrest. She was aware, however, that her brother was using methamphetamine at that time, and learned after her arrest that her boyfriend was using it as well. She stated that she "enabled" her brother's drug use by, among other things, giving him a place to live.

3. On August 8, 2001, in the Stanislaus County Superior Court, respondent pled guilty to violating Health and Safety Code section 11377, possession of methamphetamine, a misdemeanor. The court deferred entry of judgment pursuant to Penal Code section 1000, and ordered respondent to enroll in Recovery Crossroads, a drug diversion program.

4. Respondent enrolled in Recovery Crossroads and obtained a pre-placement assessment. She did not, however, complete a drug diversion program in California. Instead, she reconciled with her husband and moved with him to Arizona. Although she made some telephone calls to determine how she could complete her drug diversion program in Arizona, respondent did not participate in such a program prior to 2005.

5. Shortly after she arrived in Arizona, respondent enrolled in Long Technical College to train for a respiratory care license. On October 21, 2004, Arizona issued her a temporary respiratory care license. On October 12, 2005, she passed her CRT examination. On November 17, 2005, Arizona issued her a respiratory care license.

6. To obtain her Arizona license, respondent was required to appear before a formal panel interview to explain her California arrest for possession of methamphetamine. While she was going through that process, she learned that there was an outstanding warrant for her arrest in California for failing to complete the drug diversion program.

7. Respondent contacted the Stanislaus County Superior Court and the public defender's office and, in June 2005, obtained the court's permission to complete the drug diversion program in Arizona.

8. On August 17, 2005, Arizona Behavioral Counseling and Education, Inc. certified that respondent had completed the 36-hour substance abuse treatment program ordered by the Stanislaus County Superior Court. On July 11, 2006, the court set aside respondent's guilty plea and dismissed the criminal charges against her.

9. Rick Skaggs is a respiratory care therapist licensed in Arizona. He has been licensed since 1991. He acted as respondent's preceptor for approximately one month while she was in training. Mr. Skaggs found respondent to be a "very conscientious" worker, who was focused on providing good care to her patients. For approximately four months prior to May 1, 2007, Mr. Skaggs worked with respondent as a respiratory care therapist at St. Luke's

Medical Center in Phoenix, Arizona. During that period, respondent was Mr. Skaggs's lead therapist. Mr. Skaggs never saw respondent under the influence of drugs or alcohol when he worked with her.

10. Sandie Zweber is the Respiratory Coordinator at St. Luke's Medical Center in Phoenix, Arizona. Ms. Zweber was respondent's direct supervisor. Respondent began working at St. Luke's Medical Center on October 5, 2005, and stopped working there on May 1, 2007, when she moved to California. Respondent told Ms. Zweber about her methamphetamine arrest when Ms. Zweber interviewed her for the job. Ms. Zweber found respondent to be a competent respiratory care therapist. On respondent's performance evaluation for the period from November 2005 to November 2006, in all the rated job categories, Ms. Zweber gave respondent either 3's (always met expectations), 4's (always met and frequently exceeded expectations), or 5's (regularly and significantly exceeded expectations). Ms. Zweber wrote a letter of recommendation dated April 27, 2007, in which she praised respondent as a "valuable member of the respiratory team at St. Luke's Medical Center," and noted that respondent had "remarkable" attendance and no disciplinary issues.

11. Respondent submitted five letters of recommendation, which were admitted as administrative hearsay under Government Code section 11513, subdivision (d).<sup>1</sup> These letters were from two nurses, a therapist, St. Luke's former Respiratory Director, and a physician, all of whom worked with respondent at St. Luke's Medical Center. The letters praised respondent's clinical skills, conscientiousness, integrity, and compassion.

12. Other than her purported ignorance of how the baggie of methamphetamine got into her pants pocket, respondent generally took responsibility for her wrongdoing and her failure to complete her drug diversion program in a timely fashion. Respondent expressed what appeared to be sincere remorse. She described her arrest as a humiliating experience that she would not want to repeat. She also described her love for her work as a respiratory care therapist. There was no evidence to indicate that respondent had used or possessed any controlled substances since she was arrested in 2001.

13. Pursuant to Business and Professions Code section 3753.5, complainant submitted a Certification of Costs and Declaration of Senior Legal Analyst, which requested costs in the amount of \$1,313.00 for: (1) obtaining, reading and reviewing investigative materials; (2) drafting the Statement of Issues, correspondence, memoranda, and other case-related documents; (3) communicating with respondent's counsel, Department of Justice staff, and others concerning the case; and (4) preparing for hearing. Respondent did not

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<sup>1</sup> Government Code section 11513, subdivision (d) provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

object to the reasonableness of these costs. She did, however, object that she was not financially able to pay these costs while she was not employed. Complainant's request for costs is addressed in Legal Conclusion 12, below.

## LEGAL CONCLUSIONS

1. Pursuant to Business and Professions Code section 3750, subdivision (d), the Board may deny a license to an applicant who has been convicted of a crime that "substantially relates to the qualifications, functions, or duties of a respiratory care practitioner." Pursuant to Business and Professions Code section 3750, subdivision (g), the Board may deny a license to an applicant who has been convicted of "a violation of this chapter [the Respiratory Care Practice Act, Business and Professions Code section 3700 et seq.] or of any provision of Division 2 (commencing with Section 500)."

2. Respondent was not convicted of possession of methamphetamine. Instead, after she pled guilty, the court deferred entry of judgment and permitted her to participate in a drug diversion program. Although it took her four years to complete that program, all the charges against her were dismissed in July 2006, pursuant to Penal Code section 1000, before she applied for a respiratory care license in California. Even though respondent was not convicted of possession of methamphetamine, complainant asserted that Business and Professions Code section 3752 allows the Board to rely upon respondent's guilty plea to deny her application. Business and Professions Code section 3752 provides that a guilty plea is deemed to be a conviction for purposes of the respiratory care licensing law. Business and Professions Code section 3752 does not, however, permit the Board to ignore the provisions and purposes of the diversion statutes.

3. Penal Code section 1000.4 provides:

Upon successful completion of a deferred entry of judgment program, the arrest upon which the judgment was deferred shall be deemed to have never occurred. The defendant may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or granted deferred entry of judgment for the offense, except as specified in subdivision (b). A record pertaining to an arrest resulting in successful completion of a deferred entry of judgment program shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate.



4. In *B. W. v. Board of Medical Quality Assurance* (1985) 169 Cal. App. 3d 219, 228, the court explained the Legislature's purpose in enacting the diversion statutes as follows:

The Legislature enacted [Penal Code] sections 1000 to 1000.4 to authorize the courts "to 'divert' from the normal criminal process persons who are formally charged with first-time possession of drugs, have not yet gone to trial, and are found to be suitable for treatment and rehabilitation at the local level." [Citations.] The objects to be accomplished by this legislation are two-fold: First, to permit the courts "to identify the experimental or tentative user before he becomes deeply involved with drugs, to show him the error of his ways by prompt exposure to educational and counseling programs in his own community, and to restore him to productive citizenship *without the lasting stigma of a criminal conviction*"; and, second, to reduce the "clogging of the criminal justice system. [Citations.]" (Italics added.)

In *B.W.*, the court found that the Board of Medical Quality Assurance was prohibited from using a physician's arrest record for possession of cocaine as the sole source of information to initiate disciplinary proceedings against him after he had successfully completed a diversion program. The reasoning set forth in *B.W.* applies in this case. Even though Business and Professions Code section 3752 provides that a guilty plea is deemed to be a conviction for purposes of the respiratory care licensing law, pursuant to Penal Code section 1000.4, given respondent's successful completion of diversion and the court's dismissal of all charges against her, the Board cannot rely upon respondent's guilty plea as a conviction for the purpose of denying her application under Business and Professions Code section 3750, subdivisions (d) or (g).

5. Pursuant Business and Professions Code section 3750.5, subdivision (a), the Board may deny a license to an applicant who has "possessed in violation of the law ... any controlled substance, as defined in Division 10 (commencing with Section 11000) of the Health and Safety Code." Methamphetamine is a controlled substance as defined in Division 10 of the Health and Safety Code. (Health & Saf. Code, § 11055.) Respondent's admitted possession of methamphetamine establishes cause to deny her license application pursuant to Business and Professions Code section 3750.5, subdivision (a). (See *Sandoval v. State Personnel Board* (1990) 225 Cal. App. 3d 1498.)

6. Pursuant Business and Professions Code section 3750.5, subdivision (e), the Board may deny a license to an applicant who has been "committed or confined by a court of competent jurisdiction for intemperate use of or addiction to the use of any of substances described in subdivisions (a), (b), and (c)." Business and Professions Code section 3750.5, subdivision (e) was not shown to be applicable given the facts of this case.

7. Pursuant to California Code of Regulations, title 16, section 1399.374, the Board has adopted Disciplinary Guidelines. The Board's Disciplinary Guidelines set forth the following factors for review to determine whether evidence supports the mitigation of penalty:

1. Recognition by respondent of his or her wrongdoing and demonstration of corrective action to prevent recurrence.
2. Respondent was forthcoming and reported violation or conviction to the Board.
3. A substantial amount of time since the violation or conviction (generally 4 or more years) occurred.
4. No prior criminal or disciplinary history.

8. Respondent disclosed her arrest on her application. It has been six years since that arrest. There was no indication that she has used or possessed any illegal drugs since that time. After her arrest, she moved to Arizona, went to school, passed the CRT examination, and obtained her Arizona respiratory care license. The witnesses who testified on her behalf and the letters of recommendation all attested to her competence, integrity, and compassion as a respiratory care therapist in Arizona.

9. Respondent's purported ignorance of how the baggie of methamphetamine got into her pants pocket was, however, troubling. While respondent's rehabilitation in Arizona was commendable, the Board must have confidence that the respiratory care practitioners it licenses are forthcoming and candid. Respondent's lack of candor with respect to how she came to possess methamphetamine casts doubt on whether the Board can trust her to provide truthful information to Board inquiries in the future.

10. Respondent's failure to complete the diversion program in a more timely fashion was also troubling. Her reasons for this failure were not satisfactory. The Board must rely upon licensed respiratory care practitioners to promptly comply with all Board orders and requirements. Respondent's failure to complete her diversion program in a more timely fashion casts doubt on whether she can be relied upon to promptly comply with Board orders and requirements.

11. While respondent's recent rehabilitation is commendable, given respondent's lack of candor and failure to timely complete the diversion program, it would be contrary to the public interest, health and welfare to grant her a license at this time, even on a probationary basis.

12. Business and Professions Code section 3753.5, in relevant part, provides:

(a) In any order issued in resolution of a disciplinary proceeding before the board, the board or the administrative law judge may direct any practitioner or applicant found to have committed a violation or violations of law to pay to the board a sum not to exceed the costs of the investigation and prosecution of the case. A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the official custodian of the record or his or her designated representative shall be prima facie evidence of the actual costs of the investigation and prosecution of the case.

In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the California Supreme Court set forth the following factors to be considered to determine the reasonableness of costs sought pursuant to regulatory and statutory provisions like Business and Professions Code section 3753.5:

The Board must exercise its discretion to reduce or eliminate cost awards in a manner that will ensure that regulation 317.5 does not deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing. Thus, the Board must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a chiropractor who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed. The Board must consider the chiropractor's "subjective good faith belief in the merits of his or her position" [citation] and whether the chiropractor has raised a "colorable challenge" to the proposed discipline [citation]. Furthermore, as in cost recoupment schemes in which the government seeks to recover from criminal defendants the cost of their state-provided legal representation [citation], the Board must determine that the chiropractor will be financially able to make later payments. Finally, the Board may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation to prove that a chiropractor engaged in relatively innocuous misconduct.


Although respondent was successful in getting some of the charges included in the Statement of Issues dismissed, she was not successful in meeting her burden of showing that she should be granted a license at this time. At hearing, respondent asserted that she did not have the financial ability to pay the requested costs. She did not, however, provide any evidence to support her assertion. Given these factors, the amount of costs should not be reduced. In light of the factors set forth in *Zuckerman*, the costs of \$1,313.00 are reasonable.



ORDER

1. The application of respondent, Leeann Renee Forsythe, for a respiratory care practitioner license is DENIED.
2. Respondent shall pay to the Board its costs of investigation and prosecution in the amount of \$1,313.00.

DATED: May 31, 2007

  
KAREN J. BRANDT  
Administrative Law Judge  
Office of Administrative Hearings